United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

75-1004

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1004

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY M. NATELLI, and
JOSEPH SCANSAROLI,

Defendants-Appellants.

APPELLANT NATELLI'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

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APPELLANT NATELLI'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Preliminary Statement

Appellant Anthony Natelli respectfully petitions for rehearing, and suggests rehearing *in banc,* of the decision by a panel of the Court (Judges Hays, Mulligan and Gurfein) filed July 28, 1975, affirming his conviction for willfully and knowingly making false statements in a proxy statement filed with the Securities and Exchange Commission in violation of Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff.

Reasons For Granting Rehearing

The panel has affirmed the conviction of appellant, a certified public accountant, for "willfully and knowingly" filing a false proxy statement with the S.E.C. in an opinion which holds that he was not entitled to have the jury told that his alleged "reckless disregard" of suspicious circumstances would be sufficient to support a conviction only if he acted with a "conscious purpose to avoid learning the truth". In reaching this conclusion, the Court held that because of his status as a certified public accountant, appellant was subject to the application of a lesser standard on the issue of knowledge than was the alleged trafficker in stolen goods whose conviction was reversed by another panel of this Court in *United States* v. *Bright,* Docket No. 74-2447, decided May 21, 1975, after oral argument in this case.*

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* We recognize, of course, that in reaching its factual conclusions in this case the Court was required at this stage to view the record in the light most favorable to the Government. We believe, however, that there are several instances where the Court has made factual assertions that are either erroneous or incomplete. While none of these statements is, in itself, of overriding significance, the accumulation of these instances may have adversely affected the Court's assessment of appellant's conduct. We are, therefore, appending hereto a list of the more significant misstatements, together with a brief indication of the reasons why we believe these statements are not accurate.

The panel held that it was appropriate to instruct the jury on the amorphous concept of "reckless disregard" solely because appellant, in reviewing the company's unaudited statement of earnings for the nine months ended May 31, 1969, did not seek a direct confirmation from Thomas Mullen at Eastern Airlines of the fact that he had signed a letter in which Eastern committed itself to participate in various programs offered by National Student Marketing.* In reaching this conclusion, the panel accepts as proven the Government's assertion that the Eastern commitment was not genuine, despite the fact that the Government totally failed to prove that the letter signed by Mullen was not the legally binding commitment it purported to be. Thus, the panel has upheld a conviction for "knowingly" making a "false" statment, although there is no proof in the record that the statement at issue was, in fact, false.

The Government deliberately failed to prove this essential element because to do so, it would have had to prove

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* There were two specifications of falsity in the indictment, one relating to the inclusion of income on the Eastern contract in the company's unaudited statement of earnings, and the other relating to the lack of footnote disclosure that $750,000 of sales originally recorded in the audited statements for the period ended August 31, 1968, had subsequently been written off retroactively. There has never been any argument by the Government that the court's charge on reckless disregard had any bearing on this footnote issue, and there could be none. The evidence was clear that rather than acting "with a conscious purpose to avoid learning" whether footnote disclosure was necessary, appellant sought the advice of his S.E.C. reviewing partner, Mr. Otkiss, who concurred in the conclusion that, in the circumstances, disclosure was not necessary. The factors which led Otkiss and Natelli to conclude that footnote disclosure was not necessary were (1) the net effect of the write-offs in issue and the correction of an error in the original computation of deferred taxes was only a $21,000 reduction in income; (2) the sales and earnings of the company for the period in question had doubled as a result of poolings since the time the original report was issued; (3) the commitments that had been written off were oral contracts reported by a salesman who had been fired for engaging in fraudulent conduct; and (4) the company, at Natelli's insistence, was now recording income only on receipt of a written commitment and, as Natelli had been advised, the company's experience with written commitments had been good.

that Mullen, the Manager of Special Markets of Eastern, had conspired with the president of National Student Marketing to deceive the auditors and had actually furnished a written confirmation of this commitment during the subsequent *audit*. Mullen was indicted for this conduct shortly after the conviction herein.

The panel opinion also fails to consider the important question raised by the Government's introduction of a portion of appellant's S.E.C. testimony relating to a good faith error in computing a tax credit, made in 1969 by appellant's associate in PMM's tax department, as proof that appellant fraudulently devised this tax credit. The panel's assertion that there is no merit to our argument that it was error to admit this evidence as a predicate for the prosecutor's inflammatory argument in summation that appellant knew that this tax credit was a fraud, without any proof that appellant knew in 1969 that PMM's tax department had made an error in this regard, is in direct conflict with opinions in this and other circuits holding that before evidence of other allegedly fraudulent conduct may be admitted on the issue of knowledge and intent, there must be convicing evidence that the other fraud alleged was committed and that the accused was the actor.

ARGUMENT

I

In *United States* v. *Bright*, Docket No. 74-2447, decided May 21, 1975, after oral argument herein, this Court explained that where knowledge is an essential element of a criminal statute the jury must be told of the need to find "conscious" wrongdoing:

> "The juror's difficult task of probing the mind and will of another person is hard enough with the aid of a charge that balances the countervailing considerations. His verdict becomes suspect when he has not had the benefit of a balanced instruction from the court.
>
> To put it somewhat differently, it is common ground that negligence alone will not suffice. Nor will a reck-

> less disregard of whether the bills were stolen, standing by itself. *Such reckless disregard must be coupled with a conscious purpose to avoid learning the truth.*" (Emphasis added.) (Slip Op. 3630-3631)

In the present case, the question of appellant's knowledge—or lack of it—of the falsity of the proxy statement was central and the jury twice asked for further clarification of the term "knowingly". In holding here that, because he was a certified public accountant, appellant was subject to the application of a lesser standard on the crucial issue of knowledge and intent than was provided for Catherine Bright, this Court has established a dual standard of criminal liability which provides greater protection to those who traffic in stolen goods and narcotics than to professionals whose professional judgments are being questioned with the benefit of hindsight.*

The panel opinion states that Natelli could have been found guilty of the crime of "willfully and knowingly" making a false statement to the S.E.C. because he acted in "reckless disregard" of "highly suspicious figures" being included in the unaudited earnings figures (Op. 5181). The panel holds Natelli to "a duty in the circumstances to be suspicious of the Eastern commitment and to pursue the matter further" (Op. 5184). Finally, the panel explained that, because of this "duty", it was sufficient for the trial court's charge to allow conviction for "knowingly" making a false statement if Natelli had merely acted in "reckless disregard" of the actual facts even though there was no "conscious purpose to avoid learning the truth", as this Court has required in cases like *Bright, supra,* and the cases cited in the panel's opinion (Op. 5186).

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* Since we suggest circulation of this petition to the entire Court for consideration *in banc,* we note again that at the time of sentencing the trial judge told appellant Natelli: "I think you are absolutely sincere when you say that you did not believe that you did anything wrong on this audit or audits for National Student Marketing" (A. 284). In addition appellant passed a lie-detector test and was found to be truthful when he stated he did not know the financial statements in the proxy statement were false and misleading, and offered to submit to a similar test by a court appointed expert (A. 38-45).

There is simply no basis in the language of the statute under which Natelli was convicted, 15 U.S.C. § 78ff(a), for holding that, as a matter of substantive liability, accountants have a unique duty to search out facts which makes them criminally liable even if they have not acted *consciously* or intentionally. The statute at issue here, 15 U.S.C. § 78ff(a), provides criminal penalties only for those who *willfully* and *knowingly* make a false statement. While the existence of professional duties may result in special rules of civil liability for accountants, there is no basis in the statute at issue for giving a different and artifical meaning to the element of "knowledge" specified by Congress for criminal responsibility.

The panel's reliance on the decision of this Court in *United States* v. *Benjamin,* 328 F.2d 854, 863 (2d Cir.), *cert. denied sub nom. Howard* v. *United States,* 377 U.S. 953 (1964), to distinguish this case from *Bright* is misplaced. *United States* v. *Benjamin* did not involve any question of the adequacy of the charge on the element of knowledge and intent. In *Benjamin,* the Court was dealing solely with the question of the sufficiency of the evidence. We have never questioned the fact that it is appropriate for a jury to consider the factors stated in *Benjamin* as circumstantial evidence that the defendant accountant engaged in "conscious" wrongdoing. See *Morisette* v. *United States,* 342 U.S. 246 (1952). But in judging the adequacy of the charge, the question is not whether the circumstantial evidence might justify a finding of conscious wrongdoing; the question is whether the jury was properly instructed that they had to conclude from the circumstantial evidence that the defendant acted "knowingly and willfully". As this Court said in *United States* v. *Bright, supra:*

> "Circumstantial evidence may suffice, but the jury must understand that to convict it must find beyond a reasonable doubt that the defendant willfully and knowingly possessed the goods knowing them to have been stolen. Without that abiding belief on the part of the jury, there should be no conviction." (Slip Op. 3630)

Here the fact that the jury twice asked the court to reinstruct them on the crucial issue of knowledge and intent,

once after announcing they were deadlocked, taken with the total lack of any reference in the charge to a need to find that the defendant acted "with a conscious purpose to avoid learning the truth", strongly indicates that the jury did not have an "abiding belief" that Mr. Natelli consciously engaged in conduct he knew to be wrong. Indeed, the trial judge found that appellant was sincere in thinking he had not done anything wrong.

The panel's reliance on the charge of Judge Mansfield in *United States* v. *Simon, aff'd* 425 F.2d 796 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970), is also misplaced. First, no objection was raised to that part of the charge either in the trial court or on appeal. More important, however, after giving the portion of his charge which is similar to the charge below, Judge Mansfield told the jury three separate times that the defendants could be convicted only if they were found to have acted knowingly and wilfully with an intent to defraud. The last of the court's instructions on this issue which the jury in Simon heard was:

> "The defendants, as I have said, cannot be convicted for mistake or negligence. Only if you find a scheme to defraud by knowing falsification or concealment of material facts with intent to defraud can they be found guilty."* (*Simon* Tr. 4045)

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* The other two portions of the *Simon* charge on knowledge and intent which Judge Mansfield gave after giving the reckless disregard charge were:

> "Poor judgment, mistake, negligence, inadvertence are insufficient. Only if you find that the government has established beyond a reasonable doubt that Roth's borrowings were material facts required to be disclosed in order not to render Continental's 1962 financial statement false or misleading, that the defendants knew these facts, and that they concealed them knowingly and with intent to defraud pursuant to a scheme, may you convict." (*Simon* Tr. 4017).
>
> * * *
>
> "As I have said before, mere mistake or negligence is not a crime. Either would furnish an insufficient basis for finding the defendants guilty.
>
> "In order to establish guilt the government must show that they acted knowingly, wilfully and with intent to defraud. (*Simon* Tr. 4028-4029)

The fact that Judge Mansfield's instructions on knowledge and intent following the reckless disregard charge were so clear no doubt accounts for the fact that defense counsel did not except to the charge in this regard at the time it was given or on appeal and the jury never asked for any additional instruction on this issue. Here, on the other hand, there were no clear instructions on the need to find actual knowledge and an intent to defraud after the reckless disregard charge, exception was taken to the court's charge, and the jury twice asked for additional instructions on this issue.

Thus, we submit that neither *Benjamin* nor *Simon* support the result here and that the issue raised by the charge here is not distinguishable from the issues raised in *United States* v. *Bright, supra.* The fact that accountants may have some duty to inquire when suspicious circumstances are presented does not distinguish this case from cases such as *Bright* where citizens are presented with goods in circumstances indicating a high probability that they have been stolen. In both instances it might be reasonable but not inevitable for the jury to conclude that the failure to inquire further was the result of a "conscious purpose to avoid learning the truth". In each case, however, the jury must be instructed that in order to convict, they must find that the defendant acted with that "conscious purpose".

To hold, as the panel has, that accountants are not entitled to a "conscious purpose" instruction whereas others are, will lead to absurd results. In this case, for example, if the National Student Marketing officers who were indicted under the same statute had elected to go to trial rather than to plead guilty, their convictions would have been reversed by the panel for failure to give a "conscious purpose" charge, but appellant's conviction would have been affirmed. There is nothing in the language of the statute that could support such a result.

Nor is it fair to say that the charge here was more balanced than that in *Bright.* In *Bright* the initial charge to the jury correctly coupled the probative value of evidence of reckless disregard with a need to find "a conscious effort

to avoid learning the truth". While in giving the supplemental charge the court apparently used the disjunctive *or,* that charge, unlike the charge here, contained a reference to the concept of a "conscious effort to avoid learning the truth". Moreover, in *Bright* the court also said that it was necessary for the charge to balance the reckless disregard language with a statement that "if the jury nevertheless found that 'the defendant actually believed that the bills were not stolen' they should acquit". Here the trial judge's concluding comment was "ordinary or simple negligence alone would be insufficient to support a finding of guilty knowledge or wilfulness". Rather than focusing on the actual belief of the defendant, this comment suggested that some level of negligence greater than ordinary or simple negligence would support a conviction.

In sum, insofar as the issues presented to the jury are concerned, this case is indistinguishable from *Bright.* Here, as in *Bright*

> "at the crucial stage with the single element at issue, the defendant's 'knowledge' . . . the instruction given was insufficient to give the jury the proper balance required. It failed to give 'clarification' to the term 'reckless disregard' "* (Slip op. 3634)

II

Although it is conceded that Natelli had taken substantial steps to satisfy himself that the amount of effort expended by NSMC in obtaining the Eastern commitment was sufficient to justify recording a substantial amount of income under the percentage of completion method used by NSMC, the panel rests its finding that Natelli breached a duty to

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* There is only one possible distinction between this case and *Bright,* and it is that in *Bright* the defense counsel's exception to the charge was more explicit than that of counsel here, who took the position that the facts did not warrant the giving of this instruction at all. If this Court believes defense counsel here seriously erred in that regard, *but cf. United States* v. *Squires,* 440 F.2d 859, 863 (1971), the proper remedy is to fault counsel, but not to subject appellant to a criminal conviction by a jury which was not properly instructed on this crucial element. *United States* v. *Garguilo,* 310 F.2d 249, 254 (2d Cir. 1962).

inquire on Natelli's failure "to take the next step of seeking verification from Eastern" (Op. 5186-5187). This conclusion assumes that the Eastern commitment was bogus, and thus should not have been included in the nine-month figures, even though the Government never proved that the Eastern commitment was not genuine.

It is ironic that even if Natelli had done what the panel faults him for having failed to do, nothing would have changed. The panel assumes that, if only Natelli had checked, he would have discovered some fraud in connection with the Eastern commitment—but (1) there was no evidence at trial that the commitment was anything but genuine and the Government at trial deliberately refrained from offering any proof about any defects in the Eastern commitment because a showing of its defect would have involved proof of an apparently unique "side agreement" with Eastern making the commitment cancellable (an agreement that was part of a scheme to mislead Natelli, among others); (2) the Eastern account executive, when later asked for a verification in connection with the subsequent *audit* for the year ending August 31, 1969, actually gave the verification; and (3) the Government, shortly after the conviction here, indicted Mullen, the Eastern executive, for conspiring with NSMC executives to conceal information from the accountants, including Natelli.*

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* The indictment charging Mullen with conspiracy with National Student Marketing executives alleges:

> "a) Mullen repeatedly recommended to Eastern's management that they substantially increase their purchases of NSMC's services.
>
> b) Mullen stated to the press and public that Eastern was very satisfied with NSMC's performance.
>
> c) *Mullen provided NSMC with documents purporting to confirm that Eastern had committed itself to greatly increased purchases of NSMC services.*
>
> d) Mullen helped Randell and Kelly hide from the public the fact that Eastern had neither bound itself to utilize nor would it ever utilize anywhere near the amount of services NSMC claimed to have sold Eastern, and the further fact that he had received personal payments from Randell (without Eastern's knowledge and consent)." *United States* v. *Mullen*, 74 Cr. 172 (Emphasis added.)

Since the Government chose to charge Natelli with "knowingly" permitting NSMC to include, in its unaudited statement, income from a "false" Eastern Airline commitment, the Government was obligated to prove that the Eastern commitment was, in fact, false. See *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States* v. *Adcock*, 447 F.2d 1337 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *United States* v. *Travers*, 2d Cir. Docket No. 74-1737, decided November 16, 1974. The Government's deliberate failure to prove that the Eastern commitment letter was, in fact, false requires the reversal of Mr. Natelli's conviction.

III

Another point not treated in the Court's opinion relates to the quantum of proof necessary to support the admission of evidence of other allegedly fraudulent conduct of the defendant offered by the Government on the issues of knowledge and intent. The Government was never able to answer our argument that it was error for the court to permit the prosecution, at the very end of its case, after all its witnesses had been excused, to introduce the S.E.C. testimony of Natelli and Scansaroli that a mistake had been made in computing the deferred tax provision without any proof that this tax credit was "a fraud", as the Government argued in summation.

We do not question the proposition that proof that appellant had participated in a "fraud" not charged in the indictment would have been relevant on the crucial issue of knowledge. See, e.g., *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967). However, proof of such other "fraud" can be introduced only if there is convincing evidence that the fraud was committed and the accused was the actor. *United States* v. *Brettholz*, 485 F.2d 483 (2d Cir. 1973).

Given the overwhelming evidence that the Government knew that the error in computing the tax credit was made in good faith by Mrs. Raimondo, a PMM tax specialist,

and not by appellant, it was highly prejudicial error for the trial court to admit this evidence and permit the Government to argue that this incident was proof that appellant knowingly engaged in "fraud". This Court's dismissal of our argument in this regard as "without merit" (Op. 5194) cannot be squared with the Court's opinion in *United States* v. *Brettholz, supra,* and is in direct conflict with the decision of the Ninth Circuit in *United States* v. *Clemons,* 503 F.2d 486, 490 (9th Cir. 1974), where the Court reversed a criminal conviction stating:

> "Where [other criminal] conduct is to be admitted to show knowledge and intent, the proof must be complete enough and the fact situation proved must clearly warrant a jury finding that the . . . conduct was intentional or knowing."

CONCLUSION

The opinion of the panel should be vacated and the judgment of conviction should be reversed.

Respectfully submitted,

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Appendix to Appellant Natelli's Petition for Rehearing

1. "The original action of Natelli in permitting the booking of unbilled sales after the close of the fiscal period in an amount sufficient to convert a loss into a profit was contrary to sound accounting practice, particularly when the cost of sales based on time spent by account executives in the fiscal period was a mere guess." (Slip Opinion, p. 5177).

There is no testimony that the use of the percentage of completion method of accounting to accrue income on these commitments was considered to be contrary to good accounting practice in 1968 and 1969. Indeed Michael Sullivan, a CPA who had no connection with PMM, approved the use of this method of accounting when he prepared NSMC's statement of earnings for the nine months ended May 31, 1968, which was before Natelli did any work on NSMC (Tr. 469-482, Natelli Exs. B and C). In addition, Leon Otkiss gave unchallenged testimony that Natelli explained to him that NSMC was using this method of accounting and he considered it to be appropriate (Tr. 1747).

2. "All narrative disclosure in the footnote was stricken by Natelli. This was a violation of Accounting Principles Board Opinion Number 9, which requires disclosure of prior adjustments which affect the net income of prior periods."

All the evidence was that none of the accountants who worked on the proxy in 1969, including Government witnesses Kurek, who taught accounting, and John Buck, a CPA, viewed the failure to disclose the retroactive disclosure as a violation of Accounting Principles Board Opinion Number 9 (Tr. 629, 684-685). Moreover, this is exactly the type of technical matter on which Leon Otkiss, PMM's SEC reviewing partner, was to provide expertise

and, although he was fully aware of both retroactive adjustments, he agreed that disclosure was not required (Tr. 1750-1751).

3. "There was no disclosure that Marketing had written off $1 million of its 1968 sales (over 20%) and over $2 million of the $3.3 million in unbilled sales booked in 1968 and 1969." (Slip Opinion, p. 5175).

Of the $2 million referred to at this point, $750,000 represented Ron Michaels' contracts which Natelli believed were the result of a unique situation involving Michaels' fraud and $1 million was the Pontiac commitment which Natelli himself insisted should be written off, not because he had any reason to believe the commitment was not genuine, but because the letter simply stated that Pontiac was planning to use NSMC's services and was not a legally binding obligation in the form prepared by NSMC's counsel (Tr. 673-674, 1071).

Moreover, nowhere does the Court take note of the fact that all of the 1968 sales that were written off involved oral commitments, that in December, 1968 Natelli insisted that NSMC obtain written commitments; that Natelli had been assured that written commitments were being used, and that, in fact, NSMC's experience with written commitments had been good. These comments apply equally to the statements of the Court in Footnote 7 relating to Kurek's schedules which fail to note that those schedules showed that all of the problems contracts were oral, and that NSMC experience with the written contracts had been good (Tr. 520-527, Gx. 15).

4. "It appeared that of the $1 million of sales requiring retroactive write-off, $350,000 had already been written off by the company by subtracting these 'sales' from 1969 *current* year figures." (Slip Opinion, p. 5172).

There was no evidence that anyone believed that any contracts other than those of Ron Michaels should be writ-

ten off retroactively. It was only because it was believed that the Michaels' contracts had been recorded as a result of fraud that the unusual step of writing these contracts off retroactively was taken (Tr. 661-663, 1853-1857). In addition, the Court's statement concerning an additional $350,000 of contracts is misleading since only $212,000 of this amount related to contracts considered by PMM during the audit of August 31, 1968, the remaining $138,000 being amounts recorded by the company in November, 1969 for the first quarter of the new fiscal year. Government witness Buck said that he considered the write-off in the current year of $212,000 of 1968 contracts on which there was $100,000 of accrued costs as "immaterial" (Tr. 657-660).

5. "The failure to make open disclosure could hardly have been inadvertent. . . . There was evidence that Natelli changed the footnote to its final form." (Slip Opinion, p. 5178).

There was never any contention that the failure to disclose the write-offs was inadvertent. Indeed, the testimony was clear that Mr. Natelli made a conscious decision that this disclosure was not necessary after discussing the matter with Mr. Otkiss (Tr. 1741-1752, 1908-1910). The question that the Court leaves unanswered is why, if Natelli was engaged in a scheme to cover-up and conceal, did he draft the original footnote to show the contract loses separately, and why did he discuss the matter with Mr. Otkiss? The suggestion in the Court's opinion that the discussion with Otkiss was "without full disclosure of all relevant factors" is not consistent with Otkiss' testimony that he asked all questions he thought relevant and they were answered openly by Natelli. Given the fact that Otkiss' testimony occurred more than five years after the event, his failure to mention some precise details of his conversation with Natelli does not support a positive assertion that Natelli did not make full disclosure to Otkiss (Tr. 1737-1774).

6. "By this procedure he [Scansaroli] helped to conceal on the books the actual write-off of profits, further using the device of rounding off the tax item to make it conform exactly to the write-off.'" (Slip Opinion, pp. 5172-73).

At footnote 3 the Court says that this procedure was approved by Natelli (Slip Opinion, p. 5173). It was undisputed, however, that when Natelli learned that Scansaroli had made the tax item conform exactly to the write-off by not retroactively adjusting one Michaels' contract on which a $21,000 profit had been recorded, Natelli insisted that this retroactive adjustment had to be made showing this $21,000 difference and such an entry was in fact made (Tr. 1863-1867).

7. "At about 3 A.M. on that day, Natelli informed Randell that the 'sale' to [redacted]ontiac Division for more that $1 million could not be treated as a valid commitment because the letter from Pontiac was not a legally binding obligation. Randell responded at once that he had a 'commitment from Eastern Airlines' in a somewhat comparable amount attributable to the nine months fiscal period (which had ended more than two months earlier)." (Slip Opinion, pp. 5174-5175).

"The Eastern contract was a matter for deep suspicion because it was substituted so rapidly for the Pontiac contract to which Natelli objected . . ." (Slip Opinion, p. 5179).

Kurek admitted that from the time Natelli first saw the Pontiac letter, he had consistently taken the position that it was not a sufficiently binding document to justify the accrual of revenues (Tr. 519). Buck's testimony indicates that this was not an abrupt conversation at 3 A.M., but rather the result of a continuing dialogue between Natelli and Randell on the trip to New York and at the printers (Tr. 672-675). Natelli's unchallenged testimony was that he had been told about the Eastern commitment before the trip to the printer (Tr. 1913-1914).

8. "The Eastern 'commitment' was not only in substitution for the challeged Pontiac 'commitment' but strangely close enough in amount to leave the projected earnings figures for the proxy statement relatively intact. Marketing had only time logs of a salesman relating to the making of the proposals but no record of expenditures on the Eastern 'commitment', no record of having ever billed Eastern for services on this 'sale', and not one scrap of paper from Eastern other than the suddenly-produced letter. Nevertheless, it was booked as if more than $500,000 of it had already been earned." (Slip Opinion, pp. 5179-5180)

The Eastern commitment resulted in $390,000 less in sales and $227,000 less in income than the Pontiac commitment (Gx. 13, E 111). This difference of $227,000 of income, which the Court here describes as "strangely close" to the income from Pontiac, is more than the $210,000 of income written-off on the Michaels' contracts, which the Court considered a highly material difference in the footnote.

Since percentage of completion accounting accrues income on unbilled sales, there is no significance to the fact that there had been no billing on this sale, particularly here where Eastern had been billed and paid over $50,000 on earlier programs that had originally been reported as "unbilled receivables" (Gx. 15, E 121-124). Similarly, the fact that NSMC had only time logs on the Eastern contract was not unusual since that was totally consistent with the method of accounting being used and would have been true of many of the other unbilled receivables which were never challenged by the Government and which were later billed and collected. The statement that there was not one scrap of paper from Eastern other than the letter omits the fact that the letter acknowledged that NSMC had made a detailed presentation to Eastern in May, and Natelli did review a copy of that detailed proposal (Gx. 18, E 138; Natelli Ex. J, E 454-457). The Eastern letter is attached.

EASTERN AIR LINES INCORPORATED / 10 ROCKEFELLER PLAZA / NEW YORK, N.Y. 10020 / 212-956-4000

GX:C

Seamarole
Exh 34
4/12/71 JW T.J.S

August 14, 1969

Mr. Robert C. Bushnell
National Student Marketing Corporation
345 Park Avenue
New York, New York

Dear Bob:

This is to confirm our verbal commitment given to you on May 14, 1969.

We will accept and utilize during the fiscal year, 1970, an amount of not less than $820,000 for National Student Marketing Corporation's services as offered to us in your proposal originally submitted on May 7, 1969.

We look forward to continued success in our youth marketing efforts and to our relationship with National Student Marketing Corporation.

Best regards,

Thomas E. Mullen
Manager-Special Markets

TEM:jla

Due and timely service of Two copies
of the within PETITION is hereby
admitted this 11th day of August 1975

John J. Gould III AUSA
Attorney for APPELLEE